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In The

SUPREME COURT OF THE UNITED STATES

October Term 1941.

No. 796.

JAMES E. JACKSON, PETITIONER,

V.

JOSEPH O'GRADY, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA RESPONDENT.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI.

WALTER R. JOHNSON,
Attorney General of Nebraska,
C. S. BECK,
Assistant Attorney General of Nebraska,
Counsel for Respondent.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your respondent respectfully shows:

The petitioner in this case, James E. Jackson, is asking that a writ of certiorari issue out of this court to review a judgment of the Supreme Court of Nebraska, entered

in the above cause on September 19, 1941, which affirmed a judgment of the district court under a rule of the supreme court for the default of the petitioner herein, who was appellant in that court, in failing to file printed briefs as required by the rules of the court.

There is no federal question involved, nor any question of national or sectional importance, nor any intercourt conflict as to the law.

NATURE AND STATEMENT OF THE CASE.

The petitioner, James E. Jackson, filed his petition in the District Court of Lancaster County to secure a release from the Nebraska state penitentiary by means of a writ of habeas corpus. He was held in the penitentiary by virtue of a commitment issued out of the District Court of Sheridan County, Nebraska. This is the second time that petitioner has attempted to secure a writ of certiorari from this court, the first application having been denied in Case No. 272 of the October, 1940, term of this court under date of October 14, 1940; but thereafter, in April of 1941, he filed the petition for the writ of habeas corpus that is involved in this action. The District Court of Lancaster County denied the petitioner's application, from which ruling the petitioner appealed to the Supreme Court of Nebraska, but when reached in its regular order for hearing, there being no printed briefs on file, the decision of the district court was affirmed on the default of the appellant, and the following order was entered:

APPEAL FROM THE DISTRICT COURT OF LANCASTER COUNTY, NO. 31288.
SUPREME COURT OF NEBRASKA, SEPTEMBER TERM A. D. 1941.

Sept. 19.

JAMES E. JACKSON, Appellant,

V.

JOSEPH O'GRADY, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA, Appellee.

This cause coming on to be heard upon appeal from the district court of Lancaster County, the same having been reached in its regular order and no briefs appearing on file as required by the rules of court, it is by the court ordered that the judgment of said district court be, and hereby is, affirmed; that appellant pay all costs incurred herein, taxed at $_____; for all of which execution is hereby awarded, and that a mandate issue accordingly.

It is from this judgment of the Supreme Court of Nebraska that the petitioner now seeks to secure a writ of certiorari from this court.

It is alleged in the petition that he has been deprived of his constitutional rights because of the insufficiency of the information filed against him to charge a crime under the law, in several respects which he specificallly sets out in his petition, and he further alleges that because of the insufficiency of the information the commitment by which he is detained in restraint of his liberty is also void.

SUMMARY OF POINTS AND ARGUMENT.

Point A.

A criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, is due process of law in the sense of U. S. Constitution, 14th Amendment, so long as it includes notice

and a hearing or an opportunity to be heard before a court of competent jurisdiction, according to established modes of procedure.

Point B.

The Supreme Court of Nebraska is authorized by the State Constitution and laws to make and enforce regulatory rules of practice before that court.

Point C.

Petition herein for a writ of certiorari should be denied as it fails to show affirmatively that a federal question was presented for decision to the State court which was necessary to the determination of the action and that such question was not only determined adversely to petitioner, but that the judgment rendered could not have been given without deciding it.

ARGUMENT.

Point A.

A Criminal Prosecution in the Courts of a State, Based Upon a Law Not in Itself Repugnant to the Federal Constitution, and Conducted According to the Settled Course of Judicial Proceedings as Established By the Law of the State, is Due Process of Law in the Sense of U. S. Constitution, 14th Amendment, so Long as it Includes Notice and a Hearing or an Opportunity To Be Heard Before a Court of Competent Jurisdiction, According To Established Modes of Procedure.

Some of the numerous authorities supporting this proposition are: *Frank* v. *Mangum,* 237 U. S. 309; *Ex parte Royall,* 117 U. S. 241, 251, 29 L. Ed. 868, 871, 6 Sup. Ct. Rep. 734; *In re Frederich,* 149 U. S. 70, 77, 37 L. Ed. 653, 657, 13 Sup. Ct. Rep. 793; *Whitten* v.

Tomlinson, 160 U. S. 231, 242, 40 L. Ed. 406, 412, 16 Sup. Ct. Rep. 297; *Baker* v. *Grice,* 169 U. S. 284, 291, 42 L. Ed. 748, 18 Sup. Ct. Rep. 323; *Tinsley* v. *Anderson,* 171 U. S. 101, 105, 43 L. Ed. 91, 96, 18 Sup. Ct. Rep. 805; *Markuson* v. *Boucher,* 175 U. S. 184, 44 L. Ed. 124, 20 Sup. Ct. Rep. 76; *Urquhart* v. *Brown,* 205 U. S. 179, 51 L. Ed. 760, 27 Sup. Ct. Rep. 459.

Point A, as set forth above, is the verbatim language of paragraph two (2) of the syllabus in the case of *Frank* v. *Mangum.* Excerpts from the opinion of Mr. Justice Pitney are as follows:

> "It is indeed settled by repeated decisions of this court that where it is made to appear to a court of the United States that an applicant for habeas corpus is in the custody of a state officer in the ordinary course of a criminal prosecution, under a law of the state not in itself repugnant to the Federal Constitution, the writ, in the absence of very special circumstances, ought not to be issued until the state prosecution has reached its conclusion, and not even then until the Federal questions arising upon the record have been brought before this court upon writ of error."

(Quoting with approval what was said in *Covell* v. *Heyman,* 111 U. S. 176, 182, 28 L. Ed. 390, 392, 4 Sup. Ct. Rep. 355, a case of conflict of jurisdiction):

> "The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity.

> "It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties."

Point B.

The Supreme Court of Nebraska is Authorized By the State Constitution and Laws to Make and Enforce Regulatory Rules of Practice Before That Court.

Article V, Section 25 of the Constitution of Nebraska, provides as follows:

> "For the effectual administration of justice and the prompt disposition of judicial proceedings, the supreme court may promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters. To the same end, the court may, and when requested by the Legislature by joint resolution, shall certify to the Legislature, its conclusion as to desirable amendments or changes in the general laws governing such practice and proceedings."

In addition to this the legislature enacted Section 27-210, Compiled Statutes of Nebraska for 1929, which is as follows:

> "The judges of the supreme court shall during the month of January in the year 1913 and each second year thereafter revise the general rules of said court and adopt such additional rules as may be deemed necessary or appropriate for the dispatch of business before said court including rules for the advancement of pending causes."

And in addition, the legislature of Nebraska, in 1939, enacted Section 27-231, Compiled Statutes of Nebraska Supplement, 1941, which is as follows:

> "To promote the effectual administration of justice and the prompt disposition of judicial proceedings, the Supreme Court of the state shall have power and it is hereby directed to promulgate general rules of practice and procedure for all courts, uniform as to each class of courts, together with forms of pleadings, process, writs, motions, demurrers, rules for admission and exclusion of evidence, the taking of depositions, and all other matters incident to the practice and procedure in civil actions at law and in equity. Said rules shall neither destroy, injure, abridge, enlarge, nor modify the substantive rights of any litigant."

Under this authority the supreme court adopted the revised rules of the Supreme Court of the State of Nebraska, which were in force January 1, 1941, in which Rule 3 is as follows:

> "DEFAULTS.—Whenever the brief of the party having the affirmative is not on file by brief day, the judgment will be affirmed or the proceedings dismissed, unless otherwise ordered on sufficient showing. When default has been made by the other party and there is due proof of service of process and the briefs of the party holding the affirmative are on file with proof of service thereof within the time provided by Rule 12, he may proceed ex parte. The hearing of no case shall be delayed by default of either party in serving or filing briefs. To avoid such result the case will be disposed of as if the delinquent party's brief had not been served and filed; provided that the court may under special circumstances and on suitable terms otherwise order."

The rules with reference to printed briefs are Rule 14a, which is as follows:

> "All briefs shall be printed on unglazed white book paper on pages 6½ inches wide and 9½ inches long, trimmed size; the printed matter to be 24 picas wide and 42 picas long. The type used in the printing may be 12 point but not smaller than 11 point, except that exhibits may be printed in smaller sizes when necessary. Italic type may be used in citations."

And 14d, which is as follows:

> "The clerk of this court shall refuse to receive or file any brief not prepared in accordance with this rule and he shall immediately notify counsel of the objections thereto."

On August 25, 1941, the Supreme Court of Nebraska put into effect the latest revised rules of the Supreme Court of the State of Nebraska, and the rules copied above are identical with those in force from January 1, 1941, except that the rules with reference to the printing of briefs are referred to as 15a and 15d.

In the enforcement of the above rules, while the petitioner herein had effected his appeal to the supreme court in due time, yet when it was reached in its regular course for hearing no briefs were on file as prescribed by the rules of the court, and therefore in conformity with Rule 3, the judgment of the District Court of Lancaster County was affirmed for the default of the appellant.

Point C.

Petition Herein for a Writ of Certiorari Should Be Denied as it Fails To Show Affirmatively That a Federal Question was Presented for Decision To the State Court which was Necessary To the Determination of the Action, and That Such Question was Not Only

Determined Adversely To Petitioner But That the Judgment Rendered Could Not Have Been Given Without Deciding It.

The petitioner herein contends that merely because the Supreme Court of Nebraska affirmed the District Court of Lancaster County, that thereby they made a decision on the merits of the claim made by the petitioner. This, of course, is not true. The only thing contended in the judgment of the Supreme Court of Nebraska, as is quoted and set out in this brief, is that no briefs were on file as required by the rules of the court, and it was by the court ordered that the judgment of the district court be affirmed. This is not, and under many decisions of this court cannot be construed to be a decision on the merits of the points raised by the petitioner.

In *Eustis* v. *Bolles,* 150 U. S. 361, 14 S. Ct. 131, 37 L. Ed. 1111, this court said:

> "1. To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it.
>
> "2. Where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

Also, in *Clark* v. *Pennsylvania,* 128 U. S. 395, 9 S. Ct. 113, 32 L. Ed. 487, this court said:

> "1. This court will act only upon the record of the court below; and the petitions for a writ of error form no part of the record.
>
> "2. In order to review a state judgment it is essential that the record should disclose not only that the alleged right, privilege or immunity was especially set up and claimed in the court below but that the decision of the court was against the right so set up or claimed."

The same rule is affirmed in *Cockroft* v. *Vore,* 14 Wall. 5, 20 L. Ed. 875, and in *Patterson* v. *Stanolind Oil & Gas Company,* 305 U. S. 376, 59 S. Ct. 259, 83 L. Ed. 231.

When the present record is viewed in the light of the rule of this court as set forth in the cases cited above, and the extended note to *Hamblin* v. *Western Land Company,* 147 U. S. 531, 37 L. Ed. 267, it becomes apparent that the petitioner has not brought himself within the jurisdiction of this court by the presentation of a federal question for the decision of this court. In fact, it affirmatively appears, and petitioner alleges, that his case was affirmed by the supreme court on the sole ground that he had failed to file printed briefs in conformity with the rules. This being true, then no federal question appears, and if one did appear it was not actually decided adversely to the petitioner, nor was it a question necessary for the court to determine in order to affirm the decision of the District Court of Lancaster County, for the default of the petitioner in failing to file printed briefs in conformity with the rules of the Supreme Court of Nebraska.

CONCLUSION.

We respectfully submit that petition of this petitioner for writ of certiorari should be dismissed, and the writ denied because the record itself discloses:

1. That no federal question is involved in the action, nor was any federal question decided by the Supreme Court of Nebraska, nor was it necessary for any federal question to be decided by the Supreme Court of Nebraska in affirming the District Court of Lancaster County, Nebraska.

2. That questions only of state law are raised.

3. That the insufficiency of an information charging a crime under state law is not a federal question.

4. That no constitutional rights of the petitioner have in any way been impaired.

Respectfully submitted,

WALTER R. JOHNSON,
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of the State of Nebraska,
C. S. BECK,
Assistant Attorney General
of the State of Nebraska,
Counsel for Respondent.

Lincoln, Nebraska,
January 2, 1942.